Supreme Court, U.S.
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No. 00 -

IN THE
Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

UNITED STATES OF AMERICA,
DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND
DONNA SHALALA, *in her official capacity as Secretary of Health and Human Services,*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court's decision in *South Dakota v. Dole*, 483 U.S. 203 (1987), defining the scope of Congress's spending power, remains good law?

2. Whether a federal spending program that threatens a state with the loss of substantial federal funds if the state does not comply with onerous new federal statutes and regulations amounts to unconstitutional "coercion"?

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OPINIONS BELOW

The June 1, 2000, decision of the United States Court of Appeals for the Tenth Circuit is reported at 214 F.3d 1196, and is included in the petition appendix. The decision of the District Court is reported at 24 F. Supp. 2d 1192, and is also included in the petition appendix.

JURISDICTION

This Court's jurisdiction to review the final judgment of the Tenth Circuit is invoked pursuant to 28 U.S.C. § 1254(1). The Tenth Circuit issued its decision in this case on June 1, 2000. This petition has been filed within ninety days of that date, as required by Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

The "Spending Clause" of Article I provides that

> "The Congress shall have the Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ." U.S. Const. art. I, § 8, cl. 1.

The Tenth Amendment to the Constitution provides that

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

STATEMENT

1. *Nature of the Suit.* Kansas brought this suit for declaratory and injunctive relief in response to changes in federal child support enforcement policy as implemented by the federal Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105 (1996). The PRWORA, also known as a "welfare reform" law, "made sweeping changes in [federal] social policy relating to low-income people." Pet. App. 1a. The changes

Congress wrought threatened Kansas with the loss of potentially more than $130 million in federal funding in a given year unless Kansas complied with numerous new federal statutory requirements.

a. *The PRWORA, Title IV-D, and TANF.* In particular, through the PRWORA Congress replaced the former federal Aid to Families with Dependent Children program with a new federal Temporary Assistance to Needy Families ("TANF") program. Pet. App. 1a-2a. The new TANF program provides federal block grants to states which then use the money to provide cash assistance and support services to low-income families. *Id.* at 2a.

Title III of the PRWORA also amended the previous federal Child Support Enforcement Program (known as Title IV-D, *see* Pet. App. 2a, n.1, and *Blessing v. Freestone*, 520 U.S. 329 (1997)), which provides federal funds to states to assist in the collection of child support. *See* 42 U.S.C. §§ 651-669. States that receive such funds currently must provide child support services, in compliance with numerous federal requirements, in all cases in which the custodial parent receives TANF assistance or Medicaid or requests Title IV-D assistance.

b. *The Federal Requirements.* The PRWORA imposed numerous new federal requirements on states receiving federal funds for the TANF and Title IV-D programs. For instance, the law requires states to establish a case registry that contains all child support orders within the state, 42 U.S.C. § 654a(e), and a directory of new hires, *id.* § 653a, so that such information can be matched against a federal case registry and national directory of new hires, as part of the federal Parent Locator Service. *Id.* § 653.

The PRWORA also requires states to adopt the Uniform Interstate Family Support Act, 42 U.S.C. § 666(f), laws facilitating genetic testing and paternity establishment, *id.* §

666(a)(5), and laws authorizing state child support enforcement agencies to engage in expedited enforcement actions against non-paying, noncustodial parents. *Id.* § 666(c). The PRWORA also requires states to revoke passports, suspend various licenses, place liens on property, and notify consumer credit reporting agencies when a parent fails to pay child support. *Id.* §§ 652(k), 666(a)(1)-(4), (6)-(7), (16).

c. *The Potential Loss to Kansas.* There is no dispute in this case that if a state's child support enforcement program fails to comply with all of the foregoing federal requirements, that State risks the loss of both its federal Title IV-D child support enforcement funds and its federal TANF funding. There is further no dispute in this case that, for fiscal year 1996, the year that PRWORA was enacted, Kansas received $29.3 million in federal IV-D program money and $101.9 million in TANF funding. These federal funds accounted for 66% of Kansas's Title IV-D program operating costs and 80% of Kansas's expenditures relating to computerized data systems. *See* 42 U.S.C. § 655(a)(2)(C), (3)(B).

2. *The Lower Court Proceedings.* Kansas sought declaratory relief that the PRWORA in many respects exceeded the scope of Congress's "spending" power and unconstitutionally intruded on sovereign interests that the Tenth Amendment reserves to the States. Kansas also sought an injunction against the enforcement of numerous provisions of the PRWORA.

a. *The District Court.* The District Court dismissed the suit on the merits. The District Court began with this Court's decision in *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987), which rejected a State's challenge to a federal requirement that states raise their minimum drinking age to 21 or else risk the loss of 5% of federal highway funds. Pet. App. 20a-22a. The District Court concluded that *Dole* imposed no bar to the PRWORA's requirements. *Id.* at 23a-26a.

The court next considered whether, given the numerous requirements the PRWORA imposed and the large amount of federal funding at risk for Kansas, the PRWORA could be considered unconstitutional "coercion". Pet. App. 26a-27a. Although acknowledging that this Court's recent decisions continue to refer to the "coercion" concept in the spending power context, *id.*, the District Court opined that the "coercion" test "is ill-conceived and probably unworkable." *Id.* at 26a. Moreover, the District Court concluded that "the sanctions involved here amount to inducement rather than 'outright coercion.'" *Id.* at 27a.

b. *The Tenth Circuit.* The Tenth Circuit affirmed. The Tenth Circuit began by opining that Kansas's claims that the PRWORA exceeded the scope of Congress's "spending" power and that it violated the Tenth Amendment "are essentially mirror images of each other: if the authority to act has been delegated by the Constitution to Congress, then it may act pursuant to Article I; if not, the power has been reserved to the states by the Tenth Amendment." Pet. App. 4a. Thus, because it concluded Congress had the "spending" power authority to enact the PRWORA, the court declined to address the Tenth Amendment. *Id.*

(1) *The Dole Test.* Focusing on the Court's decision in *South Dakota v. Dole*, which the Tenth Circuit described as the "most instructive case on the Spending Clause issue," Pet. App. 4a, the Tenth Circuit discussed the four requirements of *Dole*. These are that the spending conditions (1) serve "the general welfare", (2) are stated unambiguously, (3) are related to the federal interest in the particular program and (4) are not barred by an independent constitutional prohibition. *Id.* at 4a-5a. The court concluded that the "first two restrictions are easily dispensed with." *Id.* at 5a.

As for the third restriction, the relationship requirement, the Tenth Circuit acknowledged that the majority in *Dole* and Justice O'Connor in dissent took different views of the nature

of the required relationship between the condition and the funds. Pet. App. 6a. Observing that the *Dole* majority's approach is "much less demanding", *id.*, and applying that "much less demanding" standard, the Tenth Circuit concluded that the TANF and Title IV-D programs were sufficiently related to each other that Congress could constitutionally threaten Kansas with the loss of over $100 million in TANF funds for failure to comply with Title IV-D requirements. *Id.* at 7a. Nor did the Tenth Circuit find any independent constitutional bar to the conditions the PRWORA imposes on the States. *Id.* at 7a-8a. Thus, the Tenth Circuit opined that "Kansas bears a very heavy burden in seeking to have the PRWORA declared unconstitutional. There are no recent relevant instances in which the Supreme Court has invalidated a funding condition." *Id.* at 8a.

(2) *Coercion.* The Tenth Circuit next focused on Kansas's argument that the financial penalties were so great, in light of the onerous conditions placed on the State, as to make the PRWORA an act of unconstitutional "coercion" by Congress. The court acknowledged that the Court in *Dole* articulated a "coercion" aspect to Congress's spending power. Pet. App. 9a. And the Tenth Circuit conceded that the threatened loss of federal funds in *Dole* was trivial in comparison to the amount Kansas risks losing under the PRWORA. *Id.* at 10a.

Nonetheless, the Tenth Circuit concluded that *Dole* "does not get Kansas far." Pet. App. 10a. Instead, the Tenth Circuit opined, "[t]he Court has never employed the [coercion] theory to invalidate a funding condition, and federal courts have been similarly reluctant to use it." *Id.* Noting that other lower federal courts have rejected such challenges, and opining that "the coercion theory is unclear, suspect, and has little precedent to support its application," *id.* at 11a, the Tenth Circuit rejected Kansas's coercion argument.

(3) *New York v. United States / Printz v. United States.* Lastly, the Tenth Circuit briefly addressed the Court's more recent decisions in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), which Kansas relied upon in its briefs. The court distinguished *New York* and *Printz* on the ground that the federal statutory provisions the Court invalidated in those cases were not premised on Congress's "spending" power. Pet. App. 12a-13a. The Tenth Circuit essentially found that those provisions would have been constitutional if attached as conditions to the receipt of federal funds. *Id.* at 13a.

(4) *Conclusion.* The Tenth Circuit concluded by observing that "Kansas has invited us to forge new ground in Spending Clause jurisprudence by invalidating the child support enforcement conditions Congress attached to its social welfare funding program. * * * We decline the invitation. In this context, a difficult choice remains a choice, and a tempting offer is still but an offer." Pet. App. 14a. Indeed, the Tenth Circuit opined that "Kansas' options have been increased, not constrained, by the offer of more federal dollars." *Id.*

REASONS FOR GRANTING THE WRIT

I. The Court's Decision In *South Dakota v. Dole*, 483 U.S. 203 (1987), Should Be Reconsidered

As the Tenth Circuit judges made clear, both during the oral argument below and in the opinion now before the Court, only this Court is in a position to reconsider the Spending Clause jurisprudence represented by the Court's decision in *South Dakota v. Dole*, 483 U.S. 203 (1987). Lower federal courts may question the validity of *Dole* in light of the Court's important federalism and congressional power decisions of the past decade, but only this Court can reconsider the principles established in *Dole*.

With all due respect, the time has come for such an inquiry, and the Court should reconsider whether there are

principled limits on Congress's "spending" power. In particular, the Court should address whether *Dole* imposes any meaningful or judicially reviewable limits on the spending power, and whether the "coercion" concept referred to in this Court's decisions is constitutionally valid in this context. Otherwise, the States and the lower federal courts will be left to continue litigating and addressing these issues with very little guidance from this Court. As explained below, this case presents the Court with an excellent opportunity to address important and fundamental spending power questions.

A. The Court's More Recent Federalism Decisions Undermine The Sweeping Spending Authority That *South Dakota v. Dole* Recognized

1. *The South Dakota v. Dole Test.* The Tenth Circuit recognized in this case that the *Dole* majority's articulation of the spending power test, at least as interpreted by the lower federal courts, effectively imposes no constraints on Congress's power to attach conditions to federal funds. The four *Dole* requirements are as follows:

> The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of "the general welfare." * * * Second, we have required that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously..." * * * Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs." * * * Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds.

483 U.S. at 207-08. (citations omitted).

With all due respect, the Court's extraordinarily deferential approach to the spending power in *Dole* is undermined by the

text and history of the constitutional provision, as well as the Court's more recent federalism and congressional power decisions.

2. *Constitutional Text and History*. Congress's "spending power" raises many interesting, difficult, and unsettled questions. With respect to the spending power, there are two arguments that may merit serious examination in light of the Court's recent federalism and congressional power decisions. First, the text of Article I may not give Congress the power to condition the receipt of federal money by the States on compliance with federal conditions. Rather, Article I may only give Congress the power to pay debts and spend money to support and implement federal programs directly pursuant to enumerated powers (the Madisonian view). Indeed, Article I on its face does not plausibly suggest that Congress has the spending power it has assumed and that the Court approved only in this century.

a. Thus, the first question is whether the Constitution even authorizes a spending power of the type Congress exercises today. Article I, § 8 only declares that Congress has power "to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ." U.S. Const., art. I, § 8, cl. 1. There is no indication that Congress has the power to remove revenue from the States through taxation and refuse to return it unless the States spend it in ways that Congress dictates. Relying on the text, James Madison took the view that Congress could spend only to implement programs undertaken pursuant to its enumerated, Article I powers. Alexander Hamilton, however, took a broader view of the spending power, arguing that it is not limited by Congress's enumerated powers. Justice Story later endorsed Hamilton's view in his academic writing, but the Court itself did not do so until the New Deal era. *See United States v. Butler*, 297 U.S. 1, 65-67 (1936) (discussing Madison's, Hamilton's and Story's views on the spending power); *Litman*

v. George Mason Univ., 186 F.3d 544, 556-57 and n.* (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1220 (2000) (same).

Importantly, Congress did not make significant use of spending conditions in the 19th century. The rise of the modern spending power did not occur until after three important, 20th century events: (1) ratification of the 16th Amendment in 1913, which permitted Congress to tax income directly and thus raise significantly more federal revenue than before; (2) ratification of the 17th Amendment in 1913, which requires the direct election of Senators and consequently reduced Senators' (and thus Congress's) responsiveness to the state legislatures and to States as sovereign entities; and (3) the New Deal. *See, e.g.*, Angel Mitchell, *Conditional Federal Funding to the States: The New Federalism Demands a Close Examination for Unconstitutional Conditions*, 48 U. Kan. L. Rev. 161, 161-62 and nn.1-3 (1999).

Indeed, the only two significant spending power cases that the Court decided prior to *South Dakota v. Dole* date to 1936 and 1937. *See United States v. Butler*, 297 U.S. 1 (1936); *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937). Perhaps more importantly, the Court did not endorse the Hamiltonian view of the spending power until 1937, at essentially the same time the Court endorsed the now repudiated view that Congress's commerce power is effectively unlimited.

b. The second question this case raises is whether, even if Article I gives Congress some authority to impose federal conditions on the States' receipt of federal money, that power should be more limited than what *Dole* permits. In essence, assuming the doctrine of unconstitutional conditions is valid, the Tenth Amendment and the Constitution's structure suggest that the States should be able to invoke it in this context just as individuals may in other situations. The Court has recognized that the States have a protectible constitutional interest in their sovereignty. *See, e.g., College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 119 S. Ct.

2219, 2226 (1999)(a state's sovereign immunity is "'a personal privilege'") (quoting *Clark v. Barnard*, 108 U.S. 436, 447 (1883)). That principle, coupled with the doctrine of unconstitutional conditions, suggests that Congress cannot with impunity impose any and all federal conditions on the receipt of federal money, irrespective of the resulting intrusion on state sovereignty. The Constitution creates a structure by which both the States and the Federal Government are essentially immune from direct regulation by each other, not unlike the intergovernmental immunity recognized as far back as *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

3. *Recent Decisions.* Until the Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), most judges, lawyers, and constitutional scholars would have said that Congress's Article I commerce power had no judicially enforceable limit. The Court's decision last term in *United States v. Morrison*, 120 S. Ct. 1740 (2000), reinforces the holding of *Lopez* that there is such a limit. These two important decisions postdate *Dole* by several years and undermine its apparent premise that there is no meaningful, judicially enforceable limit on Congress's Article I powers, including its spending power.

Moreover, the Court's recent decisions have relied upon not only constitutional text—which alone here undermines the claim of *any* congressional spending power—but also constitutional history and structure to protect important state sovereignty interests. Thus, in both *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), the Court invalidated congressional intrusions into state sovereignty that crossed constitutional lines demarcated by the Tenth Amendment and constitutional structure. And, in *Alden v. Maine*, 527 U.S. 706 (1999), the Court recognized that some protections of state sovereignty are created as much by constitutional structure and history as by constitutional text.

In combination, these decisions suggest that the time is ripe for reconsideration of the extraordinarily deferential

approach the *Dole* Court adopted when reviewing spending power challenges brought by states.

4. *The Alternatives.* In light of unconstitutional conditions jurisprudence, the Court should reconsider *South Dakota v. Dole* and, at a minimum, recognize that there is a judicially enforceable limit to Congress's spending power. *Cf.* Stephen R. McAllister, *Is There a Judicially Enforceable Limit to Congressional Power Under the Commerce Clause?*, 44 U. Kan. L. Rev. 217 (1996). One option would be to require congressional respect for core state sovereignty interests protected by the Tenth Amendment, the Eleventh Amendment and constitutional structure. *Cf. Alden v. Maine*, 527 U.S. 706 (1999). Another would be to preclude Congress from using the spending power to require the States to do what Congress lacks the constitutional authority or political willpower to do directly. In other words, if Congress could not or would not pass a national law pursuant to its commerce powers (or other Article I powers), it should be precluded from coercing the States to act for Congress as a condition of receiving federal money.

One beneficial consequence of revisiting *Dole* would be that Congress could be required to regulate directly—or at least more directly—by enacting preemptive federal law and spending to implement that law rather than holding a stick over the States. In the end, Congress could almost certainly still implement most important federal programs (under its commerce power, for example), but it would have to do so more directly, and consider more carefully the political costs of such regulation on a national basis.

B. At A Minimum, The Four Requirements Of *South Dakota v. Dole* Should Be Given Some Meaning

1. Virtually no lower courts have struck down federal laws as exceeding Congress's spending power.[1] Indeed, commentators have observed that the Court has "failed to provide any real protection against unconstitutional conditions in the federalism area," Jesse H. Choper, *The Supreme Court and Unconstitutional Conditions: Federalism and Individual Rights*, 4 Cornell J.L. & Pub. Pol'y 460, 464 (1995), that "*Dole* seems merely a bark without a meaningful bite", Candice Hoke, *State Discretion Under New Federal Welfare Legislation: Illusion, Reality and a Federalism-Based Constitutional Challenge*, 9 Stan. L. & Pol'y Rev. 115, 212 (1998), and that "almost no conditional spending program will fail to pass constitutional muster." Virginia Elizabeth Richards, *Our Money for Your Rights: Conditional Spending as a Restraint on Liberty*, 21 Cap. U. L. Rev. 1165, 1168 (1992). It is time for the Court to reconsider the *Dole* requirements and, at a minimum, the Court should give teeth to the third and fourth factors, the "germaneness" test and the prohibition on spending conditions that violate independent constitutional provisions.

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[1] One which did, *Virginia Department of Education v. Riley*, 106 F.3d 559, 567 (4th Cir. 1997) (en banc) (per curiam), did so on the basis that the statute was too ambiguous to give the state proper notice. Congress simply amended the statute to supersede the court's decision. *See* Pet. App. 9a. An Eighth Circuit panel last year held in *Bradley v. Arkansas Department of Education*, 189 F.3d 745 (1999), that the waiver of the States' sovereign immunity contained in the Rehabilitation Act, 42 U.S.C. § 2000d-7, is unconstitutionally coercived and exceeded Congress's spending power. The full court, however, agreed in December to hear the case en banc, and had oral argument on January 14, 2000. *See* 197 F.3d 958 (Dec. 14, 1999). No decision has yet been rendered.

2. The "germaneness" factor, as the Tenth Circuit recognized, currently is nothing more than a very deferential rational basis test. Pet. App. 6a-7a. Since virtually no legislation ever fails the rational basis test, this *Dole* factor has proven to be no constraint whatsoever on congressional spending power.

One alternative that would have some meaning would be to distinguish between what are truly "conditions" on the spending of federal money and "regulations" that are not related to the purpose for which the federal money is disbursed. *Cf. South Dakota v. Dole*, 483 U.S. 203, 216 (1987) (O'Connor, J., dissenting). Another alternative would be to adopt a higher level of scrutiny, requiring for example a "substantial" or "significant" relationship between the condition and the receipt of the funds.

In this case, Kansas is threatened with the loss of more than $101 million in TANF funds (for temporary assistance to needy families), not because Kansas may fail to comply with any conditions attached to those funds, but because Kansas might fail to comply with any one of the child support conditions attached to different federal funds for the separate Title IV-D program. Although there is obviously some relationship between the Title IV-D program and the TANF program, the federal government has turned a potential $29 million penalty (loss of Title IV-D funds) into a $130 million penalty. The conditions attached to the Title IV-D funds, however, are not conditions on spending the TANF money, nor are they substantially related in many respects to the TANF program. For instance, the Title IV-D program is focused on collecting child support obligations, while the TANF program is much broader and includes many families for whom child support obligations are not an issue.

Moreover, Congress has no Article I power over family or domestic relations law generally. *Cf. United States v. Morrison*, 120 S. Ct. 1740 (2000). Indeed, the Court has long

recognized a "domestic relations" exception to federal diversity jurisdiction that might otherwise exist in cases involving divorce, alimony and child custody. *See, e.g., Ankenbrandt v. Richards*, 504 U.S. 689 (1992); *Thompson v. Thompson*, 484 U.S. 174 (1988); *Williams v. North Carolina*, 325 U.S. 226, 233 (1945); *In re Burrus*, 136 U.S. 586, 593-94 (1890). The federal interest in child support collection is thus dependent on the potential effects of non-payment on interstate commerce. But this Court has made clear that Congress's commerce power is not unlimited. *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 120 S. Ct. 1740 (2000).

3. The Court also could consider giving some meaning to the fourth *Dole* factor, that a spending condition not violate other constitutional provisions. The *Dole* majority appears to suggest that the fourth factor only applies when the condition itself would require a state to violate the Constitution. That interpretation of the fourth factor essentially nullifies it. Indeed, it seems unlikely that Congress will impose conditions that, for example, direct a state receiving federal funds to violate the Equal Protection Clause.

A more constructive way to look at the fourth *Dole* factor would be to consider whether the spending condition is itself unconstitutional because it intrudes too far on state sovereignty as recognized and protected by the Tenth Amendment. Under such an approach, the Court could utilize constitutional text, history, tradition and precedent to determine what spending conditions might unconstitutionally intrude on the interests of the States. *Cf. United States v. Lopez*, 514 U.S. 549 (1995); *id.* at 568 (Kennedy, J., concurring); *id.* at 584 (Thomas, J., concurring); *United States v. Morrison*, 120 S. Ct. 1740 (2000); *Alden v. Maine*, 527 U.S. 706 (1999). *See also* Pet. App. 27a ("There is support for the position that these cases have resuscitated federalism and revived Tenth Amendment justiciability."). *See* Hoke, *State Discretion Under New Federal Welfare Legislation: Illusion, Reality and a*

Federalism-Based Constitutional Challenge, 9 Stan. L. & Pol'y Rev. 115 (1998).

Only by giving some life to the notion of core state sovereignty interests, protected by both the Tenth Amendment and constitutional structure, will the fourth *Dole* factor have any real meaning or impose meaningful constraints on congressional spending conditions.

II. The Court Should Take This Case To Decide Whether Certain Exercises Of The Spending Power May Unconstitutionally Coerce The States

The *Dole* majority acknowledged that "[o]ur decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)). The Court recently reiterated that proposition in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 119 S. Ct. 2219, 2231 (1999), declaring that "in cases involving conditions attached to federal funding, we have acknowledged that 'the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" 119 S. Ct. at 2231 (quoting *Dole*, 483 U.S. at 211, and *Steward Mach. Co.*, 301 U.S. at 590).

Although the Court continues to pay lip service to the idea of unconstitutional "coercion," the Court has only invalidated an act of Congress on a spending power basis once, in *United States v. Butler*, 297 U.S. 1 (1936). But, as one constitutional commentator has observed, since 1936 "the Supreme Court has effectively ignored *Butler* in judging the limits of congressional spending power." Laurence H. Tribe, *American Constitutional Law*, § 5-b, at 836 (3d ed. 2000).

In this case, if Kansas fails to comply with numerous new federal spending conditions regarding child support collection

efforts—including the passage of a uniform law, the purchase and implementation of a massive new computer database, the collection of various kinds of personal information on all Kansas citizens, and the reorganization of its social service agencies—it is threatened with the loss of not just $29 million in Title IV-D federal funds, but also another $101 million in federal TANF funds. Pet. App. 3a.

If there is no unconstitutional "coercion" in this case, it is difficult to imagine a circumstance in which a court would ever find such coercion to be present. Kansas is not suggesting that the amount of money at stake alone makes a spending condition unconstitutionally coercive. Rather, such a determination might also consider factors such as "the extent to which a state has historically relied on certain funds, the extent to which other states rely on certain funds, and perhaps the per capita cost to taxpayers to create a similar state program." Angel Mitchell, *Conditional Federal Funding to the States: The New Federalism Demands a Close Examination for Unconstitutional Conditions*, 48 U. Kan. L. Rev. 161, 191 (1999). Such an inquiry—if it suggests that the potential for coercion exists—can then be followed by a more intensive and rigorous application of the *Dole* factors. *See id.* at 192-94.

In any event, unless this Court takes a case such as this one, the lower courts, the States, and the United States are left to continue litigating "coercion" issues in the spending power context without any real guidance as to the nature and scope of that potentially important constitutional doctrine.

CONCLUSION

For the foregoing reasons, Kansas respectfully requests that the Court grant this petition for a writ of *certiorari* in order to consider the scope and nature of Congress's spending power and the doctrine of unconstitutional coercion.

Respectfully submitted,

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August, 2000

ADDENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

STATE OF KANSAS, Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA;
DEPARTMENT OF HEALTH AND
HUMAN SERVICES;
DONNA SHALALA,
in her official capacity as secretary of Health and
Human Services, Defendants-Appellees.

No. 98-3341.

June 1, 2000, Filed.

SEYMOUR, Chief Judge.

Kansas brought this action for declaratory and injunctive relief in response to changes in child support enforcement policy brought about by Title III of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA). Pub. L. No. 104-193, 110 Stat. 2105 (1996). The district court granted the United States' motion to dismiss for failure to state a claim, and Kansas appeals. We review this decision de novo, *see Morse v. Regents of the Univ. of Colorado*, 154 F.3d 1124, 1126 (10th Cir. 1998) (grant of motion to dismiss); *United States v. Bolton*, 68 F.3d 396, 398 (10th Cir. 1995) (determination of federal statute's constitutionality), and affirm.

I.

The PRWORA, also known as "welfare reform," made sweeping changes in social policy relating to low-income people. It replaced the Aid to Families with Dependent Children (AFDC) program with the Temporary Assistance to

Needy Families (TANF) program. The new program consists of federal block grants that are distributed to states, which then use the money to provide cash assistance and other supportive services to low-income families within their borders. Although this funding structure gives the states greater flexibility in designing their own public assistance programs, they are required to work toward program goals, satisfy a maintenance-of-effort requirement for the expenditure of state funds, and abide by federal regulations.

Title III of the PRWORA amended the Child Support Enforcement Program (IV-D),[1] which provides federal money to assist states in collecting child support from absent parents. *See* 42 U.S.C. §§ 651-669. State IV-D programs must currently provide child support services to all cases in which the custodial parent either receives temporary assistance under TANF or Medicaid, or requests IV-D assistance.[2]

The PRWORA imposes greater federal oversight and control over the states' participation in the IV-D program in an effort to increase efficiency in child support enforcement, particularly in interstate case, through information sharing, mass case processing, and uniformity. Among other things, the states must establish a Case Registry which contains all child support orders within the state, *see id.* § 653a, and a Directory of New Hires, *see id.* § 654a. These databases are regularly matched against one another and against a Federal Case Registry and National Directory of New Hires, which function

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[1] The Child Support Enforcement Program is commonly called IV-D because of its location in Subchapter IV, Part D of the Social Security Act.

[2] Although originally focused on AFDC families, amendments to the program in 1984 established the requirement that states provide assistance in obtaining support for all children for whom such support is requested. *See* Child Support Enforcement Amendments of 1984, H.R. Conf. Rep. No. 98-925, at 29 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2447.

as part of the existing Federal Parent Locator Service. *See id.* § 653.

The PRWORA also requires states to adopt the Uniform Interstate Family Support Act. *See id.* § 666(f). This act, which has been passed by the legislatures of all fifty states, allows state agencies to send income-withholding orders across state lines directly to employers. In addition, the PRWORA requires states to pass laws facilitating genetic testing and paternity establishment, *see id.* § 666(a)(5), and authorizing state child support agencies to take expedited enforcement action against non-paying noncustodial parents, *see id.* § 666(c). When a parent fails to pay child support, the PRWORA requires states to revoke passports, suspend professional and other licenses, place liens on property, and notify consumer credit reporting agencies, *see id.* §§ 652(k), 666(a)(1)-(4), (6)-(7), (16).

Significantly, states are not required to participate in the IV-D program. A state that elects to receive the federal block grant under the TANF program, however, must operate a child support enforcement program that meets IV-D's requirements. If a state's child support enforcement program fails to conform to the requirements of IV-D, the state risks the denial of both its IV-D child support enforcement funding and its TANF funding. The parties do not dispute that in fiscal year 1996, Kansas received $29.3 million in IV-D money from the federal government, and $101.9 million in TANF funding. These federal funds provide 66% of Kansas' IV-D program operating costs, and 80% of the expenditures relating to its computerized data systems. *See id.* § 655(a)(2)(C), (3)(B).

II.

Kansas argues that the amended IV-D program requirements are too onerous and expensive, necessitate too much manpower, and encroach upon its ability to determine its own laws. Because of the amount of money at stake, Kansas

contends it is being coerced into implementing the program requirements in violation of two provisions of the United States Constitution, specifically the Spending Clause of Article 1, § 8 and the Tenth Amendment.[3] These claims are essentially mirror images of each other: if the authority to act has been delegated by the Constitution to Congress, then it may act pursuant to Article I; if not, the power has been reserved to the states by the Tenth Amendment. See *New York v. United States*, 505 U.S. 144, 156 (1992). Because the legislation at issue was enacted pursuant to Congress' spending power, we will address the issue as arising under the Spending Clause.

A. Spending Clause Challenges Generally

Congress' spending power enables it "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980). The most instructive case on the Spending Clause issue is *South Dakota v. Dole*, 483 U.S. 203 (1987), in which the Supreme Court upheld a legislative provision directing the Secretary of Transportation to withhold federal highway money from states refusing to raise their legal drinking age to 21.

The Court in *Dole* recognized four general restrictions on Congress' exercise of power under the Spending Clause. First, Congress' object must be in pursuit of "the general welfare." *Id.* at 207. In considering whether an expenditure falls into this category, courts should defer substantially to the judgment of

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[3] Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The Spending Clause provides that "[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; . . ." U.S. Const. art. I, § 8, cl. 1.

Congress. *See, e.g., Helvering v. Davis,* 301 U.S. 619, 640-41 (1937). Second, if Congress desires to place conditions on the state's receipt of federal funds, it must do so unambiguously so that states know the consequences of their decision to participate. *See Dole,* 483 U.S. at 207. Third, the conditions must be related to the federal interest in the particular program. *See id.* The required degree of this relationship is one of reasonableness or minimum rationality. *See New York,* 505 U.S. at 167 (conditions must "bear some relationship to the purpose of the federal spending"); *id.* at 172 (conditions imposed are "reasonably related to the purpose of the expenditure"). Fourth, there can be no independent constitutional bar to the conditions. *See Dole,* 483 U.S. at 208. The Tenth Amendment itself does not act as a constitutional bar; rather, the fourth restriction stands for the more general proposition that Congress may not induce the states to engage in activities that would themselves be unconstitutional. *See id.* at 210.

Kansas does not seriously argue that the IV-D conditions in the PRWORA violate the four restrictions outlined in *Dole*. The first two restrictions are easily dispensed with. As the district court noted in its opinion below, the "general welfare" test is substantially deferential to Congress, and can clearly be met here.[4] And although contending that some of the

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[4] In its brief to this court, Kansas tries to downplay the seriousness of the problem of unpaid child support, perhaps in an attempt to argue that the general welfare requirement is not met. Kansas makes numerous references to "the perceived need to crack down on the elusive and rumored population of 'deadbeat dads'" "believed to be running from state to state," and the "rare" "so-called dead-beat dads allegedly fleeing from State to State," *Plaintiff's Br.* at 8, 10, 19, 29. These characterizations do nothing to advance Kansas' argument.

Congress made clear that non-payment of child support, particularly in interstate cases, is a widespread problem which has significant deleterious effects on children, particularly those in low-income families. The

requirements associated with the computerized database are vague, Kansas fails to assert that the alleged ambiguity resulted in its inability to exercise its choice to accept the funds knowingly and "cognizant of the consequences of . . . participation," as required by *Dole*. *Id.* at 207 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). The PRWORA unambiguously attaches its many conditions to the TANF and IV-D funds, and Kansas does not claim it accepted the money without knowledge of those conditions.

Regarding the third *Dole* requirement, under which the conditions must be related to the federal interest in the program, Kansas asserts that the IV-D conditions are not sufficiently related to the larger TANF program. This contention is based on Justice O'Connor's dissent in *Dole*, in which she argued for a closer correlation between the funding condition and the federal interest, stating that the drinking age condition was "far too over and under-inclusive" in addressing the problem of drunk driving. *Id.* at 214-15, 218 (O'Connor, J., dissenting). The majority in *Dole*, however, endorsed a much less demanding test and determined that the drinking age condition was reasonably related to the highway program

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changes in IV-D's requirements were made in response to the widespread belief that the system of pursuing child support across state lines was "far too sluggish to be effective" and "universally regarded as broken." H.R. Rep. No. 104-651, at 1405, *reprinted in* 1996 U.S.C.C.A.N. 2183, 2464. For example, Congress found that in 1992 only 54% of single-parent families with children had a child support order established and, of that 54%, only about one-half received the full amount due. 42 U.S.C. § 601 note. Only 18% of the cases enforced through the public child support enforcement system resulted in a collection. *Id.* Interstate cases represent almost 30% of all child support orders, yet yield only 10% of collections. *See* H.R. Rep. No. 104-651, at 1405, *reprinted in* 1996 U.S.C.C.A.N. 2183, 2464. While lawyers may legitimately debate the application of the laws which address the non-payment of child support, no one is served by denying the existence of the problem.

because of the connection between the drinking age and highway fatalities.

The TANF program, which provides financial support for low-income families, is clearly related to the IV-D program and its requirements, which assist low-income families in collecting child support from absent parents. See H.R. Rep. No. 104-651, at 1410 (1996), *reprinted in,* 1996 U.S.C.C.A.N. 2183, 2469 (noting IV-D complements the TANF program because establishing paternity and collecting child support may enable families to reduce dependence on the welfare system). Indeed, child support enforcement was conceived of as a related component of the AFDC system. *See* S. Rep. No. 93-1356 (1974), *reprinted in,* 1974 U.S.C.C.A.N. 8133, 8145-48 (discussing the interrelationship between the welfare system and non-support of children by absent parents). It is no coincidence that the AFDC/TANF and the child support programs are both set forth in the same subchapter of the Social Security Act, which bears the heading "Grants to States for Aid and Services to Needy Families with Children and for Child-Welfare Services."[5]

Finally, Kansas makes a few cursory arguments to the effect that the United States is requiring it to violate the privacy and procedural due process rights of its citizens. These claims center around the requirements that the state keep a directory of new hires, and that it take automatic enforcement action against those parents found to be in arrears on child support. Neither of these arguments is developed in the brief, and neither appears to have merit. In fact, Congress has expressly required participating states to adopt safeguards to protect against the unauthorized use or disclosure of confidential information handled by a state child support

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[5] As stated previously, child support enforcement falls under Subchapter IV, Part D of the statute. The TANF program is contained in Subchapter IV, Part A.

enforcement agency. *See* 42 U.S.C. § 654(26). Moreover, the states are free to adopt other measures to protect the information they receive.

In general, Kansas bears a very heavy burden in seeking to have the PRWORA declared unconstitutional. There are no recent relevant instances in which the Supreme Court has invalidated a funding condition. *See Oklahoma v. Schweiker*, 655 F.2d 401, 406 (D.C. Cir. 1981) ("Although there may be some limit to the terms Congress may impose, we have been unable to uncover any instance in which a court has invalidated a funding condition.").[6] On the other hand, there have been many cases in which the Supreme Court has upheld conditions placed on the receipt of federal funds. *See, e.g.*, *Fullilove*, 448 U.S. 448 (upholding the conditioning of federal public works funds on states' implementation of affirmative action programs for contracting), *overruled on other grounds by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Lau v. Nichols*, 414 U.S. 563 (1974) (approving section of 1964 Civil Rights Act under which schools that practice racial discrimination are excluded from federal financial assistance); *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127 (1947) (upholding decision to remove federal highway funds from Oklahoma for violations of the Hatch Act, where employee was member of the State Highway Commission while chairman of state Central Democratic Committee).

Federal courts of appeal have been similarly reluctant to invalidate funding conditions. For example, in Schweiker, 655

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[6] The Court did strike down a funding condition in *United States v. Butler*, 297 U.S. 1 (1936), but that case relied on an overly narrow view of Congress' enumerated powers to determine that Congress had overstepped its authority. The analysis in *Butler* has been discredited as flawed and unworkable, and has not been followed. *See, e.g.*, Laurence H. Tribe, American Constitutional Law § 5-b, at 836 (3d ed. 2000) ("[T]he Supreme Court has effectively ignored *Butler* in judging the limits of congressional spending power.").

F.2d 401, the D.C. Circuit upheld Congress' conditioning of Medicaid funds on state implementation of a provision in the Supplemental Security Income program. *See also California v. United States*, 104 F.3d 1086 (9th Cir. 1997) (upholding conditioning receipt of Medicaid funds on agreement to provide emergency medical services to illegal aliens); *Padavan v. United States*, 82 F.3d 23, 28-29 (2d Cir. 1996) (same); *Planned Parenthood v. Dandoy*, 810 F.2d 984 (10th Cir. 1987) (upholding Medicaid funding condition which required changes in state law regarding the provision of family planning advice to minors) (per curiam); *New Hampshire v. Marshall*, 616 F.2d 240 (1st Cir. 1980) (upholding requirements in the Federal Unemployment Tax Act).

Virginia v. Riley, 106 F.3d 559 (4th Cir. 1997) (en banc) (per curiam) (superseded by statute), represents the rare case in which a federal court invalidated a funding condition. In *Riley*, the Fourth Circuit found that conditions in the Individuals with Disabilities Education Act were not sufficiently clear and unambiguous to satisfy *Dole's* second requirement. Specifically, the court objected to conditions requiring every state to provide a free, appropriate education to learning disabled students, which the United States Department of Education later interpreted to apply even where school authorities had expelled a student for behavioral problems unrelated to the learning disability. Because we have determined that the conditions at issue in the present case do not violate *Dole's* ambiguity restriction, however, *Riley* is inapposite.

B. Coercion Theory

In addition to the four categorical restrictions, the Court in *Dole* articulated a fifth, indistinct limit on the spending power: "[I]n some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Dole*, 483 U.S. at 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590

(1937)). It is this coercion theory upon which Kansas primarily relies. The crux of Kansas' argument is that the size of its IV-D and TANF grants, totalling over $130 million, leaves it no choice but to accept the PRWORA's many requirements. In this connection, Kansas correctly argues that the Court in *Dole* specifically pointed out that the federal government there was only threatening to withhold 5% of South Dakota's federal highway funds:

> When we consider . . . that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact.

Id.

This passage does not get Kansas far. It is merely an instance in which the Court acknowledged circumstances *not* sufficient to constitute coercion. In fact, the cursory statements in *Steward Machine* and *Dole* mark the extent of the Supreme Court's discussion of a coercion theory.[7] The Court has never employed the theory to invalidate a funding condition, and federal courts have been similarly reluctant to use it. "The coercion theory has been much discussed but infrequently applied in federal case law, and never in favor of the challenging party." *Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989). Most of the treatment given the theory in the federal courts has been negative.

The boundary between incentive and coercion has never been made clear, and courts have found no coercion in

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[7] The Court also acknowledged the coercion theory in passing in *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2231 (1999). The Court merely quoted the language from *Dole* and *Steward Machine* but did not have an occasion to apply it.

situations where similarly large amounts of federal money were at stake. For example, numerous courts have upheld conditions on Medicaid grants even where the removal of Medicaid funding would devastate the state's medical system. In *Schweiker*, 655 F.2d 401, Oklahoma argued that the threat of losing all Medicaid funding was so drastic that it had no choice but to comply in order to prevent the collapse of its medical system. The D.C. Circuit stated: "[t]he courts are not suited to evaluating whether the states are faced here with an offer they cannot refuse or merely with a hard choice. . . . We therefore follow the lead of other courts that have explicitly declined to enter this thicket when similar funding conditions have been at issue." *Id.* at 414. *See also California*, 104 F.3d 1086 (conditioning receipt of Medicaid funds); *Padavan*, 82 F.3d at 28-29 (same); *Planned Parenthood v. Dandoy*, 810 F.2d 984 (upholding Medicaid funding condition). *But see Virginia v. Riley*, 106 F.3d at 561 (noting in dicta that a "substantial constitutional question under the Tenth Amendment would be presented," if the provision were not already being struck down on ambiguity grounds, because it "resembles impermissible coercion").

In any event, the coercion theory is unclear, suspect, and has little precedent to support its application. Indeed, in *Steward Machine*, the first case to articulate the coercion theory, the Court minimized its force, observing, "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible." 301 U.S. at 589-590. For all these reasons, we hold that the conditioning of TANF funds on Kansas' compliance with the requirements contained in IV-D does not present a situation of impermissible coercion.[8]

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[8] Moreover, IV-D contains a "safety valve" provision which allows states to be exempted from requirements that will not increase the effectiveness

C. New York and Printz

Kansas devotes a significant portion of its brief to a discussion of two cases that invalidated acts of Congress, *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997). Neither of these cases is persuasive to us because neither concerned legislation passed pursuant to the Spending Clause.

New York v. United States involved a provision of the Low-Level Radioactive Waste Policy Act, which was not passed pursuant to Congress' spending power.[9] The provision required states to either take title to nuclear waste generated within their borders, or regulate waste disposal according to Congressional instruction. The Court found that the take-title provision "crossed the line distinguishing encouragement from coercion," because it directly compelled the states to either take action or submit to federal regulation, and did not offer the option of declining to administer the federal program. *Id.* at 175, 177. Since neither of the alternatives presented to the states was within Congress' authority, the states had no real choice to avoid coercive government power.

> Congress has not held out the threat of exercising its spending power or its commerce power: it has instead held out the threat, should the states not regulate according to one federal instruction, of simply forcing the states to submit to another federal instruction. A choice between two unconstitutional coercive regulatory techniques is no choice at all.

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and efficiency of their CSE programs. *See* 42 U.S.C. § 666(d). In light of this, Kansas' prediction that it will be forced to labor under a cumbersome and byzantine set of regulations appears to be overstated.

[9] Significantly, the Court upheld two other provisions of the Act which were enacted under the commerce and spending powers. *See New York*, 505 U.S. at 173, 174.

Id. at 176.

The circumstances here are clearly distinguishable. The take-title mandate in *New York* was coercive because it gave states a "choice" between two unconstitutional alternatives. It was not a condition attached to the receipt of federal funding. In the present case, the states have a real choice, albeit a hard one, between accepting the money and the conditions or declining both.

Printz v. United States involved a provision of the Brady Act which improperly compelled state and local law enforcement officers to execute background checks for handgun purchasers. In striking down this provision, the Court held that Congress could not circumvent the prohibition against compelling states to enact or enforce federal regulatory programs "by conscripting the State's officers directly." *Printz*, 521 U.S. at 935. Kansas argues that its employees are being similarly conscripted to administer what amounts to a federal child support enforcement policy. We are not persuaded.

The Court in *Printz* distinguished the Brady Act, which was passed pursuant to Congress' commerce power, from Spending Clause legislation:

> [Some] federal statutes enacted within the past few decades that require the participation of state or local officials in implementing federal regulatory schemes . . . are connected to federal funding measures and can perhaps be more accurately described as conditions upon the grant of federal funding than as mandates to the States . . . . For deciding the issue before us here, they are of little relevance.

Id. at 917-18. Moreover, in *Printz* Congress directly commanded state officers to enforce a federal program. Here, state employees have to meet federal program requirements as a condition of receiving federal money under the program. While the amount of money to be lost through non-compliance

is substantial, the PRWORA does not directly compel or command state employees to take any action whatsoever. States are free to refuse to implement the conditions and to decline the grant money. Both *New York* and *Printz* are inapposite to the case at bar.

III.

Kansas has invited us to forge new ground in Spending Clause jurisprudence by invalidating the child support enforcement conditions Congress attached to its social welfare funding program. In doing so, it asks that we expand the concept of "coercion" as it applies to relations between the state and federal governments, and find a large federal grant accompanied by a set of conditional requirements to be coercive because of the powerful incentive it creates for the states to accept it. We decline the invitation. In this context, a difficult choice remains a choice, and a tempting offer is still but an offer. If Kansas finds the IV-D requirements so disagreeable, it is ultimately free to reject both the conditions and the funding, no matter how hard that choice may be. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1428 (May 1989) (discussing the resilience of the argument that "offers of conditioned benefits expand rather than contract the options of the beneficiary class, and so present beneficiaries with a free choice"). Put more simply, Kansas' options have been increased, not constrained, by the offer of more federal dollars. The requirements contained in IV-D represent a reasoned attempt by Congress to ensure that its grant money is used to further the state and federal interest in assisting needy families, in part through improved child support enforcement. This is a valid exercise of Congress' spending power, and the requirements do not render the PRWORA unconstitutional.

We **AFFIRM** the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

STATE OF KANSAS,	)	
	)	
Plaintiff,	)	
vs.	)	**Case No. 97-4256-RDR**
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM AND ORDER

Plaintiff, the State of Kansas, challenges the constitutionality of amendments to the Child Support Enforcement Program, 42 U.S.C. §§ 651-669b, enacted as part of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, Pub.L. No. 104-193, 110 Stat. 2105 (1996). Plaintiff contends that these provisions of PRWORA are unconstitutional as exceeding Congress' authority under Article I, Section 8 of the United States Constitution, and as violating dual sovereignty and the Tenth Amendment to the United States Constitution.

The defendant seeks dismissal on two grounds. First, the defendant argues that the State of Kansas lacks standing to bring this action. Second, the defendant asserts that the State of Kansas cannot prevail on the merits. Having heard oral argument on the defendant's motion to dismiss, the court is now prepared to rule.

BACKGROUND

The federal government and the states have been involved in a cooperative effort to make monetary payments to

financially needy families, including children deprived of parental support, since 1950. As the years have passed, the federal government has increased the requirements imposed upon the states.

In 1975, the federal government became a major player in child support programs with the passage of the Child Support Enforcement (CSE) Program. *See* 42 U.S.C. §§ 651-669. The Program was enacted to locate absent parents, establish paternity, and enforce child and spousal support. 42 U.S.C. § 651. The Office of Child Support Enforcement within the United States Department of Health and Human Services oversees the CSE program. The federal government funds 66 percent of state CSE program operating costs, 42 U.S.C. § 655(a)(2), and 90 percent of state expenditures relating to the planning, design, development, installation or enhancement of an automatic data processing information retrieval system. 42 U.S.C. § 655(a)(3).

PRWORA, popularly known as "welfare reform," made sweeping changes in the laws regulating the poor. It abolished Aid to Families with Dependent Children (AFDC) and created the Temporary Assistance for Needy Families (TANF) program. AFDC had provided cash payments to indigent families based upon national eligibility standards and a uniform federal definition which created an entitlement for recipients. TANF eliminated national eligibility standards and abolished the national entitlement to aid. Under the new TANF program, states are given federal block grant money with the authority to design their own public assistance programs. In exchange, the states must fulfill certain requirements, including meeting specific goals in moving welfare recipients into work and toward self-sufficiency. In addition, the states are required to comply with a variety of federal regulations.

Title III of the PRWORA details a mandatory child support collection structure that must be established and operated if a state is to remain eligible for the full TANF grant.

Key features of Title III include the creation of automated state systems for entry of all support orders and of employees who obtain new jobs; authority for income withholding; a requirement that states cooperate with the federal government and with other states in matching employees to outstanding support orders; mechanisms for speedy enforcement of support orders; and the enactment of certain laws and legal conditions, including the Uniform Interstate Family Support Act and the conferral of statewide jurisdiction on agencies and courts empowered to act in paternity and support proceedings. *See* 42 U.S.C. § 666.

The amendments contained in PRWORA were made with the intent of "establishing uniform State tracking procedures; taking strong measures to establish paternity and funding; and ensuring tough child support enforcement." H.R. Rep. No. 104-651 at 1324. The amendments were effective July 1, 1997, except that changes that had to be approved by state legislatures become effective no later than the first day of the first calendar quarter beginning after the close of the first regular session of the state legislature subsequent to August 22, 1996. 42 U.S.C. § 654 note.

A state is not required to participate in the CSE program. However, pursuant to PRWORA, a state that elects to receive the federally-funded block grant under the TANF program must comply with the statutory requirements and the regulations promulgated by the Secretary of HHS. 42 U.S.C. §§ 602(a)(2), 603. A state that operates a CSE program risks the loss of CSE funding if it fails to conform to the requirements established by the Secretary. 42 U.S.C. §§ 609(a)(5) and (a)(8).

Within the federal mandates, states have broad discretion to establish the specific rules and procedures for the operation of their child support enforcement programs. Federal law may require adoption of laws on particular topics, but states generally determine the specific procedures used. For example,

states maintain the responsibility for establishing any guidelines on the amount of support to be awarded, 42 U.S.C. § 667, or the amount of an individual's salary that may be garnished to meet support obligations, 42 U.S.C. § 666(b). In addition, if a state demonstrates to the Secretary that the enactment of any law or procedure required under 42 U.S.C. § 666 will not increase the effectiveness and efficiency of the state CSE program, the Secretary may exempt the state from such requirement. 42 U.S.C. § 666(d).

STANDING

The defendant contends that the court lacks jurisdiction because the State of Kansas does not have standing to bring this action. In the complaint, the State alleges the following concerning the issue of standing:

> The State of Kansas has standing to bring this declaratory judgment action because of the injury to its sovereignty as a State caused by the challenged federal statute. Further, any State, including the State of Kansas, which is deemed by the federal defendants to be not in compliance with the provisions of Title III of [PRWORA] is subject to federal withholding of approximately $29 million, representing nearly the entire budget for State-provided child support enforcement services for State citizens, and funds in excess of $101 million, representing aid to Kansas children and families in need, causing injury to the State and its interests.

The question of standing involves both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise. *Bennett v. Spear*, 520 U.S. 154, 162 (1997). To satisfy the standing requirements of Article III to the United States Constitution, plaintiff must show (1) that it has suffered an "injury in fact"—an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that

there is a causal connection between the injury and the conduct complained of—the injury must be fairly traceable to the challenged action of the defendant; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The burden of demonstrating standing rests with the party invoking federal jurisdiction. *Id.* at 561.

In considering the issue of standing on a motion to dismiss, the court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *State of Utah v. Babbitt*, 137 F.3d 1193, 1204 (10th Cir. 1998) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). In addition, the court must presume that general allegations embrace those specific facts that are necessary to support the claim. *Id.*

The defendant limits its standing argument to a claim that plaintiff has not met the causation requirement. The defendant points out that the plaintiff is challenging Congress' enactment of the amendments to the CSE program, but that these amendments do not constitute the cause of plaintiff's alleged injury because plaintiff is subject to the challenged federal mandates only as a result of the State of Kansas' decision to participate in, and receive federal funding pursuant to, the TANF program. Thus, the defendant asserts that standing is lacking because the plaintiff's injury is self-inflicted.

Neither side was able to provide any cases that had considered this precise issue, despite the fact that there are dozens of cases where states have challenged the constitutionality of various federal laws under the Tenth Amendment and the Spending Clause. The court is persuaded that the circumstances of this case indicate that the State has standing to pursue this action. The purpose of the causal connection requirement is to insure that the injury alleged by plaintiff is attributable to the defendant. *Duke Power Co. v.*

Carolina Environmental Study Group, Inc., 438 U.S. 59, 72 (1978). The injury noted by the defendant—the potential loss of funds and the other costs of complying with PRWORA—appears to be directly traceable to the challenged action of the defendant. Accordingly, we have little difficulty in determining that the State of Kansas has standing to challenge the requirements of PRWORA, even though the State agreed to participate in the program.

THE MERITS

The defendant contends that plaintiff cannot prevail on the merits. The defendant suggests that the factual allegations of the complaint, even when taken as true, do not state a claim under the Tenth Amendment and the Spending Clause.

Plaintiff contends that its challenge to PRWORA is based primarily upon the Tenth Amendment, relying principally upon *New York v. United States*, 505 U.S. 144 (1992); *South Dakota v. Dole*, 483 U.S. 203 (1987); and *Printz v. United States*, 117 S. Ct. 2365 (1997). Plaintiff contends that it has been "coerced" to participate in the CSE program because a decision otherwise would result in the loss of all funds for child support enforcement services and aid to children and families in need. The loss of these funds, plaintiff argues, would cause substantial injury to Kansas citizens. Plaintiff states:

> PRWORA is both more coercive and more onerous in its requirements than any other Act which has been subjected to constitutional challenge to date. By threatening Kansas with the loss of 100% of federal funding for child support enforcement, the entire State budget for such services, *and* 100% of federal funding for a separate program aiding needy families and children, PRWORA coerces the State and its employees to serve as an administrative arm of the Congressional will in a manner expressly disapproved of by the Founding Fathers who created our government as a *federalist*, not a unitary

system. If the dual sovereign structure of our government established by the Founding Fathers is to survive, PRWORA must be struck down.

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) cannot be granted unless it appears that the plaintiff can prove no set of facts that would entitle it to relief. *Maez v. Mountain States Tel. and Tel., Inc.*, 54 F.3d 1488, 1496 (10th Cir. 1995); *Jacobs, Visconsi & Jacobs Co. v. City of Lawrence*, 927 F.2d 1111, 1115 (10th Cir. 1991). In consideration of such a motion, the court must construe liberally the pleadings and indulge all favorable inferences in favor of the plaintiff. *Lafoy v. HMO Colorado*, 988 F.2d 97, 98 (10th Cir. 1993); *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991). The court, however, need not accept as true those allegations that are conclusory in nature, i.e., which state legal conclusions rather than factual assertions. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

Plaintiff argues that the issues raised by its complaint cannot be resolved on a motion to dismiss. Specifically, plaintiff suggests that the issue of coercion must await discovery before it can be addressed. The court believes that the issues raised by the plaintiff's complaint can be decided on the instant motion. *See, e.g., South Dakota v. Dole*, 791 F.2d 628, 634 (8th Cir. 1986) (affirming trial court's disposition of a Spending Clause challenge at the motion to dismiss stage), *aff'd*, 483 U.S. 203 (1987); *California v. United States*, 104 F.3d 1086, 1091-92 & n. 10 (9th Cir. 1997) (rejecting plaintiff's contention that motion to dismiss inappropriate on grounds that Spending Clause challenge required determination as a matter of fact of whether coercion existed).

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S.Const. amend. X. "If a power is delegated to Congress in the Constitution, the Tenth

Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York*, 505 U.S. at 156. Congress, through the Spending Clause set forth in Article I, section 8 of the Constitution, may "hold out incentives to the State as a method of influencing a State's policy choices" or may "encourage a State to regulate in a particular way." *Id.* at 166. In a case such as this one, where Congress has attached conditions to the receipt of federal funds, the inquiries under the Spending Clause and the Tenth Amendment "are mirror images of each other." *Id.* at 156.

Congress has for many years used conditional offers of federal funds to regulate the actions of the states. The Constitution grants Congress the power to "provide for the common Defence and general Welfare of the United States." U.S.Const. art I, § 8, cl. 1. Under the Constitution, the federal government's conditioning of funds is permissible if (1) the spending is in furtherance of the general welfare; (2) Congress does so unambiguously to the end that states may knowingly exercise their choice to either accept or reject the funds; (3) the conditions imposed are reasonably related to the federal interest in the particular program; and (4) no constitutional provision "provide[s] an independent bar to the conditional grant of federal funds." *Dole*, 483 U.S. at 207-08; *see also Rust v. Sullivan*, 500 U.S. 173 (1991) ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest."); *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937) (Congress may spend its money, and place conditions on those expenditures, as it sees fit, so long as the expenditures and conditions are made in pursuit of "the general welfare."). In addition to these four restrictions, the *Dole* court read the Spending Clause to impose limits on Congress's ability to "coerce" states in ways that it could not directly mandate under its other Article I powers. The Court observed: "In some

circumstances, the financial inducement offered by congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id.* at 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)). The Court concluded that a threatened loss to states of five percent of their otherwise obtainable allotment of federal highway funds did not pass this critical point, but did not suggest what percentage of these funds might. *Id.* This case was in accord with numerous cases at the Supreme Court level and in the lower courts that have failed to invalidate an Act of Congress under the Spending Clause. *See, e.g., Fullilove v. Klutznick*, 448 U.S. 448, 478-80 (1980); *Massachusetts v. United States*, 435 U.S. 444, 461-62 (1978); *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974); *Oklahoma v. United States Civil Service Comm.*, 330 U.S. 127, 142-44 (1947); *Texas v. United States*, 106 F.3d 661, 666 (5th Cir. 1997); *California v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997); *Virginia v. Browner*, 80 F.3d 869, 881-82 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 764 (1997); *Housing Auth. of City of Fort Collins v. United States*, 980 F.2d 624, 628-29 (10th Cir. 1992); *Oklahoma v. Skinner*, 655 F.2d 401, 413-14 (D.C.Cir. 1981).

Plaintiff initially raises some cursory arguments that Congress, in passing PRWORA, has violated some of the four conditions set forth in *Dole*. Plaintiff's primary argument, however, is that it has been coerced into participating in the Title III requirements of PRWORA in order to avoid the loss of funds for its programs for the poor. Plaintiff suggests this is the case noted in *Dole* where "the financial inducement offered by Congress . . . [is] so coercive as to pass the point at which pressure turns into compulsion." *Dole*, 483 U.S. at 211 (citation and quotation omitted).

The court is persuaded that the four conditions stated in *Dole* are present in this case. There can be little dispute that the first requirement is met here. Courts are required to defer substantially to Congress' judgment in determining whether a

particular expenditure serves general public purposes. *Dole*, 483 U.S. at 207. The overall goal of PRWORA was to protect children and facilitate the self-sufficiency of welfare recipients. The requirements of Title III of PRWORA were designed with the intent of "establishing uniform State tracking procedures; taking strong measures to establish paternity and funding, and ensuring tough child support enforcement." H.R.Rep. No. 104-651 at 1324. Accordingly, we have little trouble in determining that the challenged provisions are intended to serve the general welfare. *See Childrens & Parents Rights Ass'n v. Sullivan*, 787 F. Supp. 724, 735 (N.D. Ohio 1991) ("[C]hild support regulations are within the 'pursuit of the general welfare.'").

As to the second requirement, plaintiff asserts only that certain, unidentified, computer-related standards are ambiguous, but does not contend that any of the remaining "approximately 94 separate sections of Title III of PRWORA" it challenges are ambiguous. Plaintiff also does not assert that any perceived ambiguity in the amendments resulted in its failing to "exercise [its] choice knowingly," as required by *Dole*.

The requirement that recipients of federal funds receive unambiguous notice of the conditions they are assuming is to ensure the voluntariness of their participation in federal programs. *Pennhurst v. Halderman*, 451 U.S. 1, 17 (1981) ("By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation."). At the hearing on the instant motion, defendant pointed out that new legislation passed in July of this year may have solved plaintiff's complaints about the computer-related problems. In any event, the court does not find that plaintiff has demonstrated that any perceived ambiguity in PRWORA precluded it from exercising its choice knowingly.

In addressing the third requirement, plaintiff has suggested that the demands of Title III of PRWORA are over-inclusive

and under-inclusive. Plaintiff has suggested that certain changes in the child support enforcement program will not prove efficacious. The court is persuaded, despite the arguments made by the plaintiff, that the measures enacted by Congress in PRWORA are reasonably related to the federal interest in the national program. The statutory requirements here at issue clearly demonstrate sufficient relationship to the purpose of the federal funding so as to pass constitutional muster.

The arguments made by plaintiff appear to have their basis in the dissent written by Justice O'Connor in *Dole*. Justice O'Connor would have applied a substantially different germaneness test than that articulated in the majority opinion. As set forth previously, the majority was concerned only that a funding condition not be "unrelated 'to the federal interest in particular national projects or programs,'" and thus sought to ensure minimum rationality in the relationship between the funding condition and the federal interest sought to be advanced. *Dole*, 483 U.S. at 207 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)). Justice O'Connor, in contrast, would have required a much closer fit between the funding condition and the proclaimed federal interest. Thus, she, unlike the *Dole* majority, would not sustain a funding condition found to be over- or under-inclusive. *Dole*, 483 U.S. at 214-15. She therefore would have invalidated the funding condition on the ground that it was "not sufficiently related to interstate highway construction." *Id.* at 214, 218. While plaintiff's arguments have some support in Justice O'Connor's mind, they have no support in the majority opinion. Accordingly, the court must reject them.

Finally, the challenged provisions do not violate any "independent constitutional bar." This requirement means that Congress may not use its powers under The Spending Clause "to induce the States to engage in activities that would themselves be unconstitutional." *Dole*, 483 U.S. at 208. Plaintiff has failed to articulate a valid independent

constitutional bar present here, and the court sees none. Accordingly, we find that the four conditions of *Dole* are met.

The court shall now turn to the issue of coercion. The Supreme Court and other courts have recognized that the judiciary should attempt to avoid becoming entangled in ascertaining the point at which federal inducement to comply with a condition becomes compulsion. Justice Cardozo wrote in *Steward Machine Co.*, 301 U.S. at 589-90 (1937): "[T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." Or, as stated by the District of Columbia Circuit Court in *Oklahoma v. Schweiker*:

> The courts are not suited to evaluating whether the states are faced here with an offer they cannot refuse or merely a hard choice. Even a rough assessment of the degree of temptation would require extensive and complex factual inquiries on a state-by-state basis. We therefore follow the lead of other courts that have explicitly declined to enter this thicket when similar funding conditions have been at issue.

655 F.2d at 414.

Finally, as stated in *Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990):

> [C]an a sovereign state which is always free to increase its tax revenues ever be coerced by the withholding of federal funds—or is it the state merely presented with hard political choices? The difficulty if not the impropriety of making judicial judgments regarding a state's financial capabilities renders the coercion theory highly suspect as a method of resolving disputes between federal and state governments.

These cases suggest that the coercion test is ill-conceived and probably unworkable. *See also Steward Machine Co.*, 301 U.S. at 590 (ruling that no such coercion had occurred in the

case then before the Court, "assum[ing] that such a concept can ever be applied with fitness to the relations between state and nation"). In *Dole*, the Court never defined "compulsion" or "pressure," explained how one should or could consistently distinguish between the two, or provided any example of an impermissibly "coercive" offer of federal funds to the states. Professors and commentators have roundly criticized the coercion test. *See, e.g.*, Baker, Conditional Federal Spending, 95 Colum. L. Rev. 1911 (1995); Engdahl, The Spending Power, 44 Duke L. Rev. 1 (1994); Rosenthal, Conditional Federal Spending and the Constitution, 39 Stan. L. Rev. 1103 (1987). Nevertheless, as recognized in *Dole* and reaffirmed in *New York*, it stands as the law at the present time in evaluating challenges based upon the Spending Clause. Plaintiff has suggested that *New York* and *Printz* have weakened the test and indicated that a change in the law is on the horizon or should occur. There is support for the position that these cases have resuscitated federalism and revived Tenth Amendment justiciability. *See* Hoke, State Discretion Under New Federal Welfare Legislation: Illusion, Reality and a Federalism-Based Constitutional Challenge, 9 Stan. L. & Pol'y Rev. 115 (1998). The court, however, believes that we are bound to apply the coercion test under the circumstances set forth here. The court is not persuaded, even assuming that all of the allegations contained in the plaintiff's complaint concerning the "pressure" of complying with the dictates of PRWORA are true, that plaintiff can prevail on the coercion theory. Wherever the line separating encouragement from coercion may lie, Congress has not crossed it in the case at bar. The court believes that the sanctions involved here amount to inducement rather than "outright coercion." *See New York*, 505 U.S. at 165-67. In sum, the court finds that Title III of PRWORA is a valid exercise of power by Congress under the Spending Clause. As a valid exercise of that power, it also comports with the requirements of the Tenth Amendment. *Id.* at 173-75.

A close look at *New York* and *Printz* suggests that they do not provide support for the plaintiff's position here. In *New York*, the Court upheld two provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021b-2021j, one under the Spending Clause and the other under the Commerce Clause, and struck down one provision. The offending provision presented states with a choice: either they could "take title" to radioactive waste generated within their borders or regulate storage and disposal of such waste according to the direction of Congress. The Court held that the "take title" provision went too far and "crossed the line [that] distinguish[ed] encouragement from coercion." 505 U.S. at 175. The "choice" presented to the states was the regulation of low-level radioactive waste according to federal standards or the acceptance of title to the waste, along with the attendant liabilities. Characterizing the latter as essentially a federal order compelling states to subsidize radioactive waste generators, the Court found that the take-title provision "'commandeer[ed] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.* at 176 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1984)). Because the provision did not offer states the option to "decline to administer the federal program," it went beyond Congress's powers and "infring[ed] upon the core of state sovereignty reserved by the Tenth Amendment." *Id.* at 177.

In *Printz*, the Court struck down certain provisions of the Brady Handgun Violence Protection Act, commonly referred to as the Brady Act, as violative of the Tenth Amendment. The Court noted that these provisions forced the states to take action by commanding the chief law enforcement officers of state and local law enforcement agencies to make "reasonable efforts" to conduct background checks on prospective gun buyers. 117 S. Ct. at 2383-84. The Court held that Congress cannot force state officers to administer or enforce federal law. *Id.* at 2381.

Unlike the "take title" provision in *New York*, the statute at issue in *Printz* did not compel state lawmakers to adopt federal regulations or legislation. However, it required "state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme." *Id.* at 2369. The Court held that no constitutionally significant distinction could be drawn between compelling a state legislature to make federal law and compelling state officials to enforce federal law. *Id.* at 2380.

New York and *Printz* are simply inapposite here. Here, neither the state legislature nor state officers are faced with the choices that were presented in those cases. Plaintiff is required only to choose between receiving federal funds and complying with certain statutory mandates, or not receiving such funds. This is a choice as pointed out previously that the Supreme Court has repeatedly held to be constitutional. In both *New York* and *Printz*, the Court recognized this distinction. *See New York*, 505 U.S. at 171-72; *Printz*, 117 S. Ct. at 2376. Indeed, the Supreme Court in *New York* and *Printz* held that the statutes at issue in those cases were unconstitutional even though it specifically recognized that both statutes could have been lawfully passed pursuant to Congress's Spending Clause power. *See Printz*, 117 S. Ct. at 2385 (O'Connor, J., concurring) (noting that Congress could have conditioned the States' receipt of federal funds on compliance with the statute); *New York*, 505 U.S. at 167 (noting that Congress could have enacted the statute under its Spending Clause power).

IT IS THEREFORE ORDERED that defendant's motion to dismiss (Doc. # 12) be hereby granted for the reasons set forth in the foregoing memorandum.

IT IS SO ORDERED.

Dated this 9th day of October, 1998 at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge